



No. 83-650

In The
Supreme Court of the United States
October Term, 1983

LEE MEYERSON,

Petitioner,

vs.

THE STATE OF ARIZONA, ARIZONA BOARD OF REGENTS, RALPH M. BILBY, RUDY E. CAMPBELL, ESTHER N. CAPIN, EARL H. CARROLL, THOMAS CHANDLER, WILLIAM G. PAYNE, WILLIAM P. REILLY, TIO A. TACHIAS, RENEE MARLER, JOHN SCHWADA, PAIGE E. MULHOLLAN, KARL H. DANNENFELDT, JOYCE FOSTER, GUIDO WEIGAND, AUSTIN JONES, LEONARD D. GOODSTEIN, PETER KILLEEN, JOHN DOES I THRU V, and JANE DOES I THRU V,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. A. Whether a handicapped employee may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, only where a primary objective of the federal financial assistance involved is to provide employment.
- B. Whether the federal financial assistance involved in this case had a primary purpose of providing employment.
- C. Whether a handicapped employee must establish a nexus between his employment and a specific federally funded program or activity in order to maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.
- II. Whether a private right of action exists under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793.
- III. Whether suit can be brought under 42 U.S.C. § 1983 based upon a violation of Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793.

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THE STATE OF ARIZONA, ARIZONA BOARD OF REGENTS, RALPH M. BILBY, RUDY E. CAMPBELL, ESTHER N. CAPIN, EARL H. CARROLL, THOMAS CHANDLER, WILLIAM G. PAYNE, WILLIAM P. REILLY, TIO A. TACHIAS, RENEE MARLER, JOHN SCHWADA, PAIGE E. MULHOLLAN, KARL H. DANENFELDT, JOYCE FOSTER, GUIDO WEIGAND, AUSTIN JONES, LEONARD D. GOODSTEIN, PETER KILLEEN, JOHN DOES I THRU V, and JANE DOES I THRU V,

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition of Lee Meyerson for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals) in this case. In this regard, Respondents accept Petitioner's List of Par-

ties, identification of the Decisions Below, Jurisdictional Statements, and Appendix.

This Court has already granted certiorari in *Consolidated Rail Corp. v. LeStrange*, No. 82-682, (*LeStrange*) which raises an issue essentially the same as issue IA in this case.¹ Respondents are also advised that this Court is holding in abeyance the petition for certiorari in *Metropolitan Atlanta Rapid Transit Authority v. Jones*, 82-1159, which raised an issue essentially the same as issue IA in this case.² Accordingly, it would seem appropriate, with regard to issue IA, to hold petitioner's request for certiorari in abeyance pending the outcome of *LeStrange*. Respondents are not opposed to the Court's holding this petition in abeyance as to issue IA.

Respondents are opposed to the manner in which petitioner has worded IA in his petition for certiorari as well as some of the statements petitioner has made in support of his request. In addition, respondents are opposed to petitioner's request for certiorari as related to issues IB, IC, II and III, and respectfully request this Court to deny these portions of petitioner's request. The basis of this opposition is more fully set forth below.

¹ "Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U. S. C. § 794, where the primary objective of the employer's Federal financial assistance is unrelated to employment." *LeStrange*, brief for petitioner, Questions Presented (first question).

² "May employee maintain action against his employer for employment discrimination on basis of handicap under § 504 of Rehabilitation Act if his employer receives no federal financial assistance primarily for purpose of providing employment." 52 U. S. L. W. 3100.

STATUTORY PROVISIONS INVOLVED

- I. 29 U. S. C. § 793, as amended, Pub. L. 95-602, Title I, § 122(d) (1), Nov. 6, 1978, 92 Stat. 2987:

Employment under Federal contracts.

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action

thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

- II. 29 U.S.C. § 794, as amended Pub. L. 95-602, Title I, §§ 119, 122(d) (2), Nov. 6, 1978, 92 Stat. 2982, 2987:

Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such relation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794a, Pub. L. 93-112, Title V, § 505, as added Pub. L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 1982:

Remedies and attorney fees.

(a) (1) The remedies procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor, or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

III. 42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252:

Prohibition against exclusion from participation in denial of benefits of, and discrimina-

tion under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U. S. C. § 2000d-3, Pub. L. 88-352, Title VI, § 604, July 2, 1964, 78 Stat. 253:

Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

IV. 42 U. S. C. § 1983 in pertinent part provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall

be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.



STATEMENT OF THE CASE

Dr. Meyerson is a handicapped professor in the Psychology Department at Arizona State University (the University).³ Dr. Meyerson charges that the University has discriminated against him in four ways: by preventing him from advancing and fostering his field of study, by failing to provide him with sufficient resources for research and study, by impairing his opportunities for professional development, and by paying him a salary which is not commensurate with his experience or service.⁴

⁴After pursuing administrative remedies through the University, Dr. Meyerson filed a Section 503 complaint with the United States Department of Labor (the Department). The Department found cause to believe that the

³ This statement of facts is taken essentially from the Ninth Circuit decision in this case. Petitioner's Appendix pp. 2a-3a. Dr. Meyerson emphasizes in his petition that he is a "qualified" handicapped person. It is unclear why Dr. Meyerson emphasizes this since it has never been an issue in the case.

⁴ Dr. Meyerson charges in his petition, at p. 5, that "Respondents chose neither to deny nor remedy the discriminations." This allegation does not appear to be relevant to the issues before the Court. Nevertheless, Respondents would like to point out that they have done both. Respondents denied that they have ever discriminated against Dr. Meyerson. See Answer, paragraph 7, excerpt of record, Vol. I, p. 191. At the same time Respondents took numerous actions in an attempt to alleviate Dr. Meyerson's perceptions that he was being discriminated against. See footnote 5, *infra*.

University had discriminated against Dr. Meyerson and sought to conciliate the matter. Although the parties disputed the effect of the Department's activities, Dr. Meyerson did admit that the situation improved after he filed his complaint.⁵ Petitioner's Appendix, p. 3a.

On or about September 4, 1980, Dr. Meyerson filed a complaint in district court for the District of Arizona. He charged the University with discrimination under four different statutory provisions: (1) Section 504 of the Rehabilitation Act of 1973, as amended, (the Act), 29 U. S. C. § 794, (2) Section 503 of the Act, 29 U. S. C. § 793, (3) 42 U. S. C. § 1983, and (4) the Revenue Sharing Act, 31 U. S. C. §§ 1242, 1244(a).

Respondents moved for summary judgment on all four claims. The district court granted the University's motion on the Section 503 claim on the basis that there is no private right of action under Section 503, and further held that Meyerson could not assert a Section 1983 claim based on Section 503. Petitioner's Appendix, pp. 14a-17a, 21a-22a. The court also dismissed the Revenue Sharing Act claim, without prejudice, for failure to exhaust administrative remedies. Petitioner's Appendix, pp. 20a-21a. The district court denied without prejudice the Univer-

⁵ On April 14, 1981 the Department closed its investigation of Dr. Meyerson's complaint based upon the actions taken by the University. These actions included a salary increase in the 1979-80 academic year of \$4,215, an offer to Dr. Meyerson to serve on at least three faculty committees, a review of Dr. Meyerson's requirements for work space and an explanation to Dr. Meyerson of the process for requesting additional space, and the purchase of a keyboard device for Dr. Meyerson's use in telephonic communication. However, as noted by the Court of Appeals, these actions were not a part of the record below. Petitioner's Appendix, p. 11a.

sity's motion on the Section 504 claim because of an inadequate record, and also denied the motion for summary judgment on the Section 1983 claim pending resolution of the Section 504 issue. Petitioner's Appendix, pp. 18a-22a.

After discovery the parties filed cross-motions for summary judgment. The district court granted the University's motion on the Section 504 claim both because Dr. Meyerson failed to establish a sufficient nexus between himself and any federally funded program or activity, and because Dr. Meyerson failed to show that a primary objective of the federal assistance involved was to provide employment. The district court also granted summary judgment as to Section 1983 since there was no violation of Section 504. Petitioner's Appendix, pp. 24a-27a.

Dr. Meyerson appealed the decisions regarding Sections 503, 504 and 1983 to the Court of Appeals. The Court of Appeals affirmed, Judge Ferguson concurring, on the basis that there is no private right of action under Section 503; that a private action under Section 504 cannot be maintained unless a primary objective of the federal financial assistance is to provide employment and that Dr. Meyerson had failed to make such a showing; and that a Section 1983 action based on Section 503 is precluded because Congress has foreclosed private enforcement of that statute whether brought directly under Section 503 or indirectly under Section 1983. See Petitioner's Appendix, 1a-12a. Since the Court of Appeals concluded that Dr. Meyerson failed to establish that any of the federal financial assistance at issue had a primary purpose of providing employment, it did not consider whether

he had established a sufficient nexus between himself and any federally funded program or activity. Petitioner's Appendix, p. 5a, fn. 1.

Petitioner then filed his petition for a writ of certiorari with this Court pursuant to 28 U. S. C. § 1254(1).

ARGUMENT

I. Issues related to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U. S. C. § 794:

A. It would be appropriate, with regard to the issue of whether a handicapped employee may maintain an employment discrimination action under Section 504 only where a primary objective of the federal financial assistance involved is to provide employment, for the Court to hold this petition in abeyance pending the outcome of this Court's review of Consolidated Rail Corp. v. LeStrange.

As noted above, this Court has already granted certiorari in *Consolidated Rail Corp. v. LeStrange*, No. 82-682 (oral argument scheduled for November 29, 1983). The first issue raised in *LeStrange* is essentially the same as the first issue here, although in a different context. See footnote 1, *supra*. A similar issue was also raised in *Metropolitan Atlanta Rapid Transit Auth. v. Jones*, 82-1159, see footnote 2, *supra*, and Respondents are advised that the Court is presently holding the petition for certiorari in *Jones* in abeyance pending the Court's resolu-

tion of the issue in *LeStrange*. The same action would seem appropriate here.

The Court will note, however, that Respondents are suggesting a wording of the issue different from that proposed by Petitioner. Petitioner couches the issue in terms of "standing." The issue has not been considered by the courts below as one of standing, nor has Petitioner previously so couched the issue.

The issue is not one of standing. The concept of standing arises out of Article III of the United States Constitution and revolves around whether the plaintiff has suffered actual injury redressable by the Court. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The issue here revolves around the scope of the congressional action and whether the Court of Appeals was correct in holding that "a private action under section 504 'cannot be maintained unless a primary objective of the federal financial assistance is to provide employment.'" Petitioner's Appendix, p. 4a, quoting from *Scanlon v. Atascadero State Hospital*, 677 F. 2d 1271, 1272 (9th Cir. 1982).

In addition, contrary to Petitioner's wording of the issue, there is no controversy in this case regarding the "otherwise qualified" wording of Section 504. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397 (1979). As noted by the Court of Appeals, Respondents have not contested Dr. Meyerson's handicapped status and was aware of his condition at the time he was hired. Petitioner's Appendix, p. 2a. Dr. Meyerson remains employed by Respondents, and Respondents have taken no action regarding Dr. Meyerson based upon his handicaps.

B. The issue of whether the federal financial assistance at issue in this case had a primary objective of providing employment is not appropriate for review by this Court since in this case this issue is one of fact, not of law.

After discovery and as a part of his motion for summary judgment, Dr. Meyerson presented a number of different grants and contracts to the district court in support of his Sections 503 and 504 actions.⁶ Excerpt of record Vol. II (entire volume). Contrary to the assertion contained in the petition for certiorari, each of these grants or contracts was to a specific faculty member and none was to the Psychology Department (although some faculty members in the Psychology Department were recipients). The uncontroverted evidence before the District Court was that the Psychology Department had never been generally funded by any federal grant. Transcript of Record, p. 34.

In his motion for summary judgment, Dr. Meyerson summarized the federal grants and contracts received by members of the Psychology Department. Transcript of Record, pp. 144-145. For each grant or contract Dr. Meyerson listed the "purpose." There was not a single grant or contract listed with a purpose of providing employment. Based upon an analysis of these specific grants and contracts the District Court concluded that, although several resulted in some employment activity, none had a primary purpose of providing employment.⁷ Petitioner's Ap-

⁶ As discussed further under part C, *infra*, Dr. Meyerson never established any nexus with any of these grants or contracts.

⁷ It is recognized that Section 504 has no application to federal contracts, but since the courts below concluded that none

pendix, pp. 26a-27a. This finding was affirmed by the Court of Appeals. Petitioner's Appendix, p. 5a.

Accordingly, since this issue turns on the facts of this particular case, certiorari should be denied.

C. The issue of whether a handicapped employee must establish a nexus between his employment and a specific federally funded program or activity in order to maintain an employment discrimination action under Section 504, is not appropriately presented for review in this case.

Respondents recognize that this issue is essentially the same as the second issue presently under review by this Court in *LeStrange*.⁸ Accordingly, the Court may wish to hold this portion of the case in abeyance pending the Court's action in *LeStrange*.

Nevertheless, Respondents would point out that this issue was not considered by the Court of Appeals because that Court concluded that none of the federal financial assistance identified by Dr. Meyerson had a primary objective of providing employment anyway. (See part B, *supra*.)—Petitioner's Appendix, p. 5a, footnote 1. Since the

(Continued from previous page)

of these programs or activities had a primary purpose of providing employment, the courts never had to distinguish between the two.

⁸ "Whether a handicapped applicant for employment who cannot demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance may nevertheless maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794." *LeStrange*, brief for petitioner, Questions Presented (second question).

Court of Appeals has not considered the issue, it is not appropriately presented for review at this time.

Accordingly, Respondents would urge that the Petition be denied as to this issue.

II. Since the Courts of Appeal are unanimous in holding that there is no private right of action under Section 503, this is not an issue the Court should accept for review.

The Courts of Appeal are unanimous in concluding that there is no private right of action under section 503. *Beam v. Sun Shipbuilding & Dry Dock Co.*, 679 F. 2d 1077 (3d Cir. 1982); *Fisher v. City of Tucson*, 663 F. 2d 861 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 178; *Rogers v. Frito-Lay, Inc.*, 611 F. 2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889; *Simpson v. Reynolds Metals Co., Inc.*, 629 F. 2d 1226 (7th Cir. 1980); and *Hoopes v. Equifax, Inc.*, 611 F. 2d 134 (6th Cir. 1979). This Court has already twice denied certiorari regarding this issue. *Fisher, supra*; and *Rogers, supra*.

In addition, the factor on which Petitioner relies in seeking certiorari, i. e., that the administrative procedures established by the Act are impotent, is not appropriately presented by this record. Respondents note here, as they have noted below, that they took numerous steps in an effort to resolve Dr. Meyerson's complaints and, in fact, on the basis of these actions by Respondent the Depart-

ment of Labor closed its investigation of Dr. Meyerson's complaint.⁹ See footnote 4, *supra*.

As noted by the Court of Appeals, although Dr. Meyer-son contested the effect of the Department's efforts, even he had to admit that "the situation at ASU with regard to discrimination has improved." Petitioner's Appendix, p. 3a. At the same time, the Court of Appeals noted that the facts regarding the efforts of the Department and the effects of those efforts were not a part of the record and therefore it was "unable to determine the extent to which the enforcement mechanism has been effective." Petitioner's Appendix, p. 11a. Petitioner acknowledges the inadequacy of the record in this regard in his Petition, pp. 19-20, footnote 15.

The Court of Appeals also stated, regarding Dr. Meyer-son's argument of administrative impotency:

It is not our function, however, to "consider whether the current enforcement mechanism is the best method to effectuate the purposes of the Act, our function is to determine the intent of Congress." [citation omitted]. We have concluded that Congress intended these remedies to be exclusive; it is largely irrelevant whether we think that these remedies are efficacious.

Petitioner's Appendix, p. 11a.

In light of the inadequacy of the record regarding the factual aspects of Petitioner's argument regarding a private right of action under Section 503, and in light of the unanimity of the Courts of Appeal regarding the issue,

⁹ Dr. Meyerson had also filed complaints with the Office for Civil Rights (OCR) in the Department of Education. He subsequently withdrew portions of his complaint and the remainder were administratively closed by OCR on May 6, 1980 due to Department of Labor involvement. These facts are also not a part of the record below.

this question simply does not warrant an expenditure of the Court's resources. Accordingly, as to this issue, the Petition for Certiorari should be denied.

III. The Court should deny certiorari regarding the issue of whether Petitioner can bring suit under 42 U. S. C. § 1983 based on a violation of Section 503, as Petitioner's position is simply erroneous.

Dr. Meyerson argues that even if there is no private right of action under Section 503, he should still be able to assert a claim under 42 U. S. C. § 1983 based on an alleged violation of Section 503. He bases this contention on his conclusion that the administrative "enforcement mechanisms [under Section 503] have proved unavailing", Petition at p. 19, and that one should be able to bring a private enforcement action under 42 U. S. C. § 1983 based upon any statute unless "Congress has affirmatively stated that there shall be no private right of action." Petition at p. 21.

As noted under Part II above, the record in this case simply is not an appropriate one from which to judge the efficacy of the administrative enforcement mechanisms under Section 503. Further, as noted by the Court of Appeals, the effectiveness of the administrative remedies is primarily a legislative decision and "largely irrelevant" to a determination of whether Congress intended to create a private right of action. Petitioner's Appendix, p. 11a.

Furthermore, Petitioner's proposition of law, that private enforcement should be allowed under 42 U. S. C. § 1983 unless expressly prohibited by Congress, is contrary to the prior expressions of this Court. Petitioner states

that his proposition of law necessarily flows from this Court's decision in *Maine v. Thiboutot*, 448 U. S. 1 (1980). However, such a contention has twice been rejected by this Court since that decision. *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U. S. 1, 18-19 (1981) (*Middlesex*); and *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 28 (1981) (*Pennhurst*).

In neither *Middlesex* nor *Pennhurst* had Congress expressly prohibited private enforcement of the statutes at issue; yet, in both cases the Court proceeded to an analysis of whether the remedial devices provided in the legislation were sufficiently comprehensive to demonstrate a congressional intent to preclude the remedy of suits under § 1983.

As the Court stated in *Middlesex*:

The Court . . . has recognized two exceptions to the application of § 1983 to statutory violations. In *Pennhurst State School and Hospital v. Halderman*, we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under § 1983. In the present cases because we find that Congress foreclosed a § 1983 remedy under these Acts, we need not reach the second question whether these Acts created "rights, privileges, or immunities" within the meaning of § 1983.

When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.

453 U. S. at 19-20 (citations omitted).

Since the record in this case does not appropriately frame the facts upon which Petitioner seeks to base his argument, and since Petitioner's proposition of law has previously been considered and rejected by this Court, review of this issue should be denied.

CONCLUSION

Based on the foregoing, Respondents request the Court to do the following:

1. As to issue 1.A (whether a handicapped employee may maintain an employment discrimination action under Section 504 only where a primary objective of the federal financial assistance involved is to provide employment), hold the Petition for Certiorari in abeyance pending the resolution of *Consolidated Rail Corp. v. LeStrange*, No. 82-862.

2. As to all other issues, deny the Petition for Certiorari.

Respectfully submitted,

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